



Michael AVEN, Serial No. 09/497,708

REMARKS

REJECTION UNDER 35 USC §103(A)

Claims 1-3, 6-8, 11, 12 and 15-17 are not *prima facie* obvious over Valcke et al. (US 5,714,507). To establish *prima facie* obviousness, the examiner must show in the prior art some suggestion or motivation to make the claimed invention, a reasonable expectation for success in doing so, and a teaching or suggestion of each claim element. See, e.g., *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988); *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992); *In re Merck & Co., Inc.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986); *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974).

The presently claimed invention is an emulsifiable concentrate containing at least one azole derivative, an alkoxylate of an aliphatic alcohol, an anionic dispersant and an aprotic organic solvent (claim 1). In the present specification, applicants assert that even though enhancing metconazole (an azole derivative) through combination with certain adjuvants, alkoxylated alcohols, in particular, is known in the art, there exists no suggestion in the art for the creation of emulsifiable concentrate formulations comprising metconazole and alkoxylated alcohols (p.2:5-9)

In Valcke, the discussion of emulsifiable concentrates does not indicate that it is contemplated, desired, or even possible in the art to create an emulsifiable concentrate using metconazole *and* an alkoxylated alcohol. Valcke states that

The active ingredients of formula (I) and (II) are used in unmodified form *or* together with adjuvants conventionally employed in the art of

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formulation. The formulations, i.e. the compositions, preparations or mixtures containing the active ingredients and, *where appropriate*, a solid or liquid adjuvant, *are prepared following art-known procedures*

including preparation of emulsifiable concentrates (col.5:56-65, emphasis supplied).

Given the applicants' assertion that a metconazole/alkoxylated alcohol emulsifiable concentrate is *not* known in the art, it follows that Valcke *cannot* be suggesting such a combination. The examiner has not demonstrated that one of skill in the art would doubt the objective truth of this statement in the applicants' specification, and accordingly, the Valcke reference cannot successfully be used to demonstrate this aspect of the applicants' invention.

As it cannot be conclusively demonstrated that Valcke suggests making an emulsifiable concentrate comprising *both* meconazole *and* an alkoxylated alcohol, and as the examiner retains the burden to demonstrate from the prior art that such a suggestion, together with a reasonable expectation for success, *is* found in the prior art, applicants respectfully assert that no *prima facie* case of obviousness has been established. Accordingly, unless the examiner is able to formulate such a conclusive demonstration, applicants respectfully request the rejection under 35 USC §103(a) be withdrawn.

#### CONCLUSION

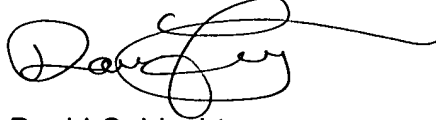
In view of the foregoing amendments and remarks, applicants consider that the rejections of record have been obviated and respectfully solicit passage of the application to issue.

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Respectfully submitted,

KEIL & WEINKAUF

A handwritten signature in black ink, appearing to read 'David C. Liechty', with a long horizontal flourish extending to the right.

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